

THE LINCOLN COMMISSION ON HUMAN RIGHTS

2010 CIVIL RIGHTS CONFERENCE

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AFFIRMATIVELY FURTHERING FAIR HOUSING



PRESENTED BY

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REGION VII OFFICE OF FAIR HOUSING AND EQUAL OPPORTUNITY

SERVING KANSAS, MISSOURI, IOWA, AND NEBRASKA

AGENDA

- ② Office of Fair Housing and Equal Opportunity (FHEO) Mission.
- ② Fair Housing Planning (FHP).
- ② Analysis of Impediments (AI)
- ② Nuances of *U.S. ex rel. Anti-Discrimination Center v. Westchester County*
- ② Key Points for Affirmatively Furthering Fair Housing

OFFICE OF FAIR HOUSING AND EQUAL OPPORTUNITY (FHEO)

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OUR MISSION

“To create equal housing opportunities for all persons in America by administering laws that prohibit discrimination in housing on the basis of race, color, religion, national origin, sex, disability, and familial status.”

VEHICLES FOR ACHIEVING OUR MISSION

⊙ Enforcement

- ⊙ Investigation of Fair Housing complaints.

⊙ Program Compliance

- ⊙ HUD regulations which implement Title VI provides for the ***periodic review of practices of HUD recipients.***

⊙ Education and Outreach

- ⊙ Your local FHEO office can be contacted to conduct your Fair Housing—***at no cost.*** Fair Housing training does not have to come as a result of a Fair Housing complaint.

FAIR HOUSING PLANNING

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AUTHORITIES

Primary Authorities:

- 1962: Executive Order 11063.
- 1968: Title VIII of the Civil Rights Act of 1968 – *the Fair Housing Act* – § 808(e)(5)
- 1994: Executive Order 12892.

See Appendix for a more comprehensive list of authorities related to AFFH.

EXECUTIVE ORDER 12892 (1994)

- ◎ “[A]ll executive departments and agencies shall administer their programs and activities relating to housing and urban development (including any Federal agency having regulatory or supervisory authority over financial institutions) in a **manner affirmatively to further the purposes of the [Fair Housing] Act....**” §2-202

See also Executive Order 11063, Nov. 20, 1962, §102; Executive Order 12259, Dec. 31, 1980, §1-202

FAIR HOUSING ACT

- ◎ FHA requires HUD to “administer [housing] programs...in a manner affirmatively to further the policies of [the Fair Housing Act],” including the general policy to “provide, within constitutional limits, for fair housing throughout the United States.”

42 USC 3608(e)(5).

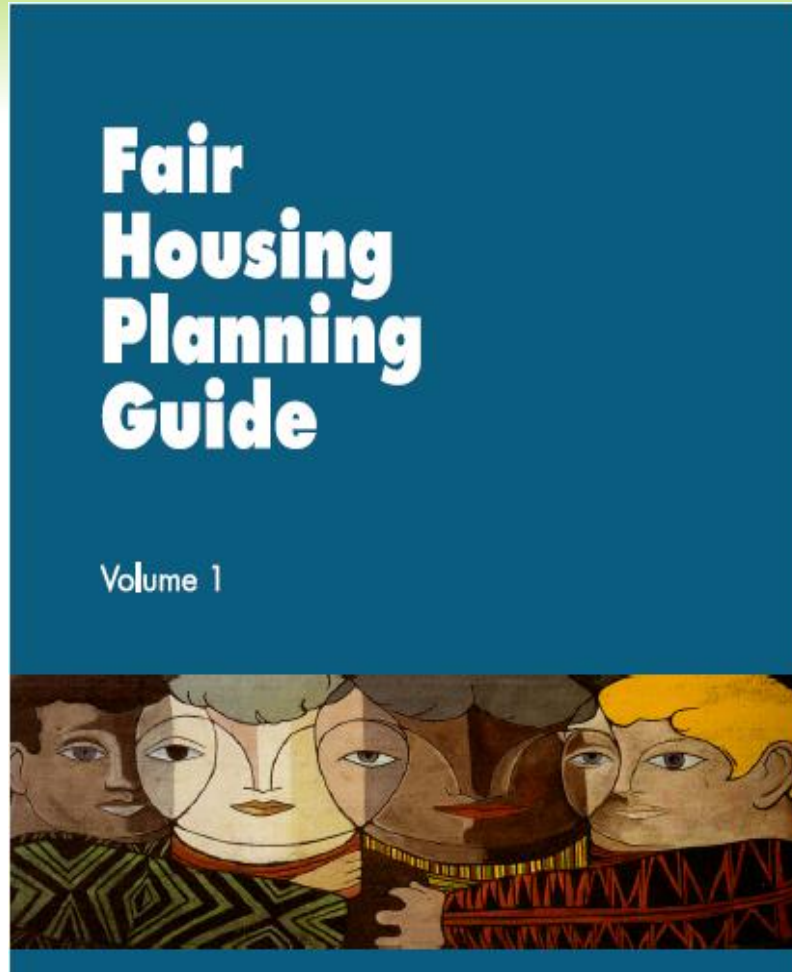
DEFINING “AFFIRMATIVELY FURTHERING FAIR HOUSING”

- ◎ **What does this mean?**
 - ◎ In general, using Federal financial assistance and other program resources to overcome barriers to fair housing choice.

AFFIRMATIVELY FURTHERING CERTIFICATION PROCESS

- ◎ As part of the Consolidated Plan, grantees will submit an **AFFH certification** which requires them to undertake **Fair Housing Planning (FHP)** through:
 - ◎ Analysis of impediments.
 - ◎ Appropriate action planning and implementation to overcome the effects of any identified impediments.
 - ◎ Recordkeeping and assessment reflecting the analysis and actions taken.

GUIDANCE FOR FAIR HOUSING PLANNING



FAIR HOUSING PERSPECTIVE

- ◎ Where the **community planning and development perspective** looks directly at needs for housing and possible barriers to meeting those needs, the **fair housing perspective** focuses as much on the causes of needs of groups or persons protected by the Fair Housing Act as it does on the needs themselves.
- ◎ Thus, the explanation of barriers to affordable housing to be included in the Consolidated Plan may contain a good deal of relevant Analysis of Impediments information but **may not go far or deep enough into factors that have made poor housing conditions more severe for certain groups.**

AFFH BEYOND HUD FUNDING

- ③ Although the grantee's AFFH obligation arises in connection with the receipt of Federal funding, its ***AFFH obligation is not restricted to the design and operation of HUD-funded programs*** at the State or local level.
- ③ The AFFH ***obligation extends to all housing and housing-related activities*** in the grantee's jurisdictional area **whether publicly or privately funded**. (FHPPG, p. 1-3)

ANALYSIS OF IMPEDIMENTS

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ANALYSIS OF IMPEDIMENTS TO FAIR HOUSING CHOICE

- ◎ The AI is a review of impediments to fair housing choice in the public and private sector. The AI involves:
 - ◎ A comprehensive review of a State or Entitlement jurisdiction's laws, regulations, and administrative policies, procedures, and practices.
 - ◎ An assessment of how those laws, etc. affect the location, availability, and accessibility of housing.

ANALYSIS OF IMPEDIMENTS TO FAIR HOUSING CHOICE

And...

- ⦿ An assessment of conditions, both public and private, affecting fair housing choice for all protected classes.
- ⦿ An assessment of the availability of affordable, accessible housing in a range of unit sizes.

WHAT ARE IMPEDIMENTS?

- ② Any actions, omissions, or decisions taken because of race, color, religion, sex, disability, familial status, or national origin ***which restrict*** housing choices or the availability of housing choices.
- ② Any actions, omissions, or decisions ***which have the effect*** of restricting housing choices or the availability of housing choices on the basis of race, color, religion, sex, disability, familial status, or national origin.

NUANCES OF WESTCHESTER

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FALSE CLAIMS ACT

- © In addition to its substantive provisions, the FCA provides that private parties may bring an action on behalf of the United States. 31 U.S.C. 3730 (b). These private parties, known as “*qui tam relators*,” may share in a percentage of the proceeds from an FCA action or settlement.

ANTI DISCRIMINATION CENTER

- ◎ The Anti-Discrimination Center works to prevent and remedy all forms of discrimination in housing, employment, education, and public accommodations through advocacy, litigation, education, outreach, monitoring, and research.
- ◎ The Center is a 501(c)(3)not-for-profit corporation organized under the laws of the State of New York.

<http://www.antibiaslaw.com/about-us>

U.S. EX REL. ANTI-DISCRIMINATION CENTER V. WESTCHESTER COUNTY

- ◎ County received \$52 million+ in CDBG, HOME, ESG funds from 2000-2006.
- ◎ Receipt of funds required repeated AFFH certifications.
- ◎ Litigation brought under the False Claims Act: AFFH certifications were false because County did not consider race-based impediments to fair housing choice .
 - ◎ Treble Damages.
 - ◎ Share available to “relator”.

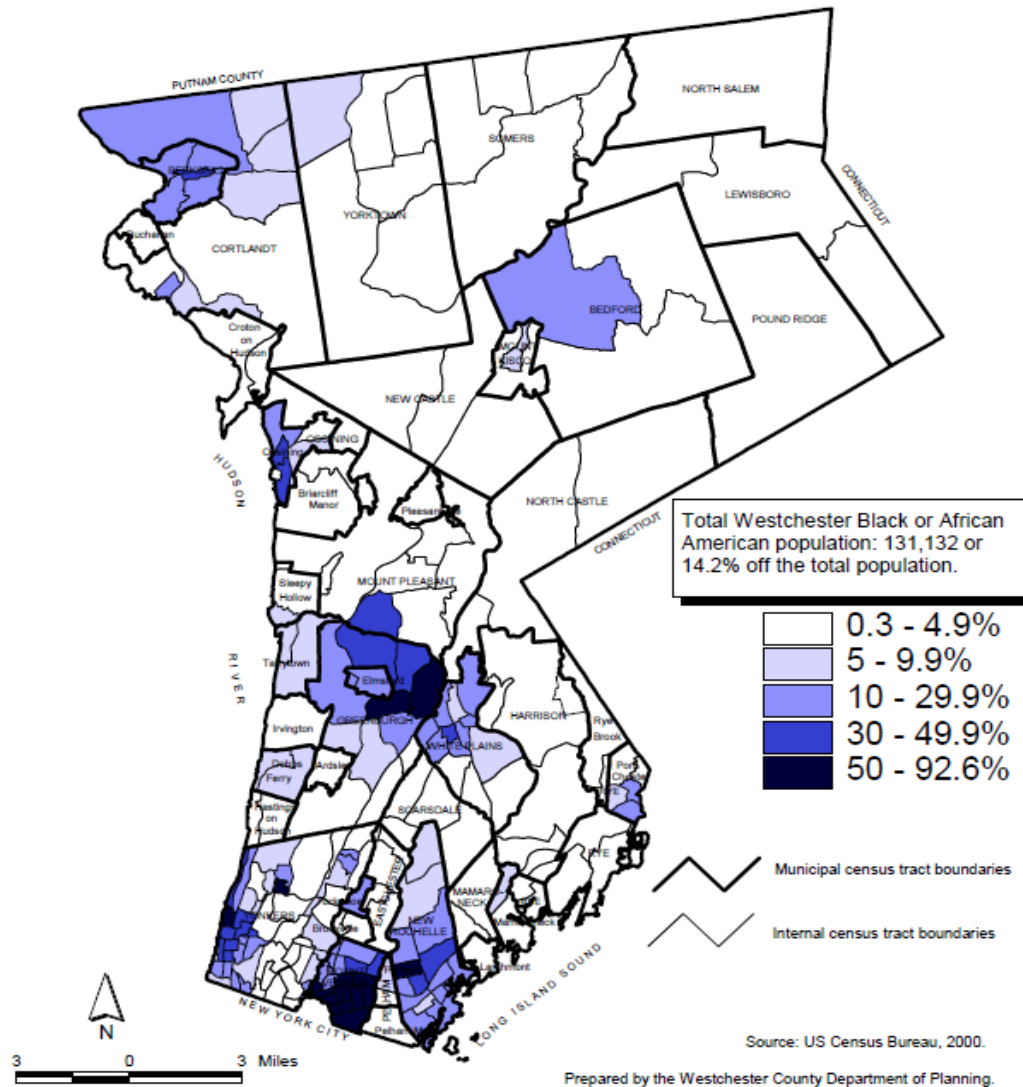
Courtesy of Michael Allen, Relman, Dane & Colfax, PLLC

40 CONSORTIUM MUNICIPALITIES

- ③ County as a whole has 16% African-Americans.
- ③ 40% of Consortium Municipalities have African-American populations of 1% or less.
- ③ 60% of Consortium Municipalities have African-American populations of 3% or less.
- ③ A handful of municipalities have African-American populations above 16%: Yonkers, New Rochelle, Mount Vernon, White Plains, Peekskill, Greenburgh.

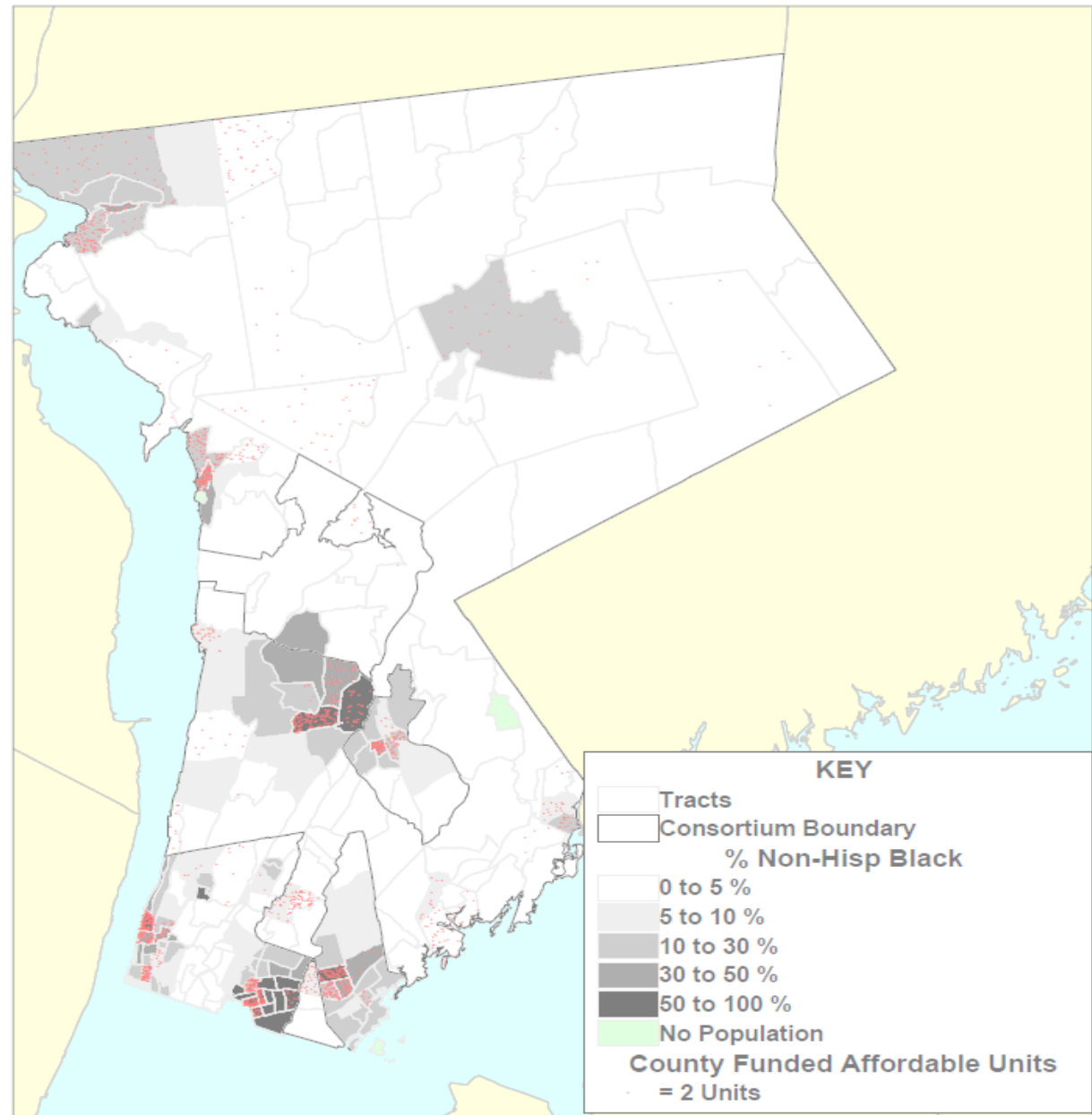
Courtesy of Michael Allen, Relman, Dane & Colfax, PLLC

WESTCHESTER COUNTY, NY



Courtesy of **Michael Allen, Relman, Dane & Colfax, PLLC**

Exhibit R-2. Placement of Proposed and Built County Funded Affordable Housing Units, 1996 through 2007



Courtesy of **Michael Allen, Relman, Dane & Colfax, PLLC**

SEGREGATION AND RESTRICTED HOUSING

- ◎ In the AI, the jurisdiction should describe the degree of segregation and restricted housing by race, ethnicity, disability status, and families with children; how segregation and restricted housing supply occurred; and relate this information by neighborhood and cost of housing.
- ◎ This description should also discuss the extent to which a broad variety of accessible housing for persons with disabilities are distributed throughout the jurisdiction, demonstrating efforts made to provide such housing in an integrated setting. (FHPG, p. 2-28)

WESTCHESTER AI

- © 2000 and 2004 Analyses of Impediments (“AIs”): “The [Fair Housing Plan] describes the housing needs of handicapped persons, larger/smaller families [and] extended families....”
- © AIs do not identify any impediments on the basis of race, color, national origin or any other protected class, even though County is part of one of the most segregated regions in the country.
- © No mention of housing discrimination or residential segregation.

ALLEGATIONS OF THE COMPLAINT

- ③ Westchester excluded consideration of impediments to fair housing based on race when it was required by statute to consider them.
- ③ Westchester did not engage in any independent analysis or exploration of impediments to fair housing choice.
- ③ Westchester refused to identify or analyze community resistance to integration on the basis of race and national origin as an impediment.

ALLEGATIONS OF THE COMPLAINT

- © As a matter of policy, County **refused to monitor** the efforts of participating municipalities to further fair housing and did not inform them that Westchester might withhold federal funds if the municipality did not take steps to further fair housing.
- © Throughout the false claims period, Westchester **never required a participating municipality to take any steps** to increase the availability of affordable housing or otherwise affirmatively further fair housing.

COUNTY'S DEFENSE

- ③ Nowhere in the statute itself or in the implementing regulations is race mentioned specifically as an impediment to fair housing that grantees were required to consider.
- ③ Westchester states that “income is arguably a better proxy for determining need than race when distributing housing funds.”
- ③ Race is “not among the most challenging impediments” to fair housing.

DECISION ON MOTION TO DISMISS

- © “In the face of the clear legislative purpose of the Fair Housing Act, enacted pursuant to Congress's power under the Thirteenth Amendment as Title VIII of the Civil Rights Act of 1968, to combat racial segregation and discrimination in housing, **an interpretation of ‘affirmatively further fair housing’ that excludes consideration of race would be an absurd result.**”

Westchester, 495 F.Supp.2d 375, 387-88 (S.D.N.Y 2007)

Courtesy of Michael Allen, Relman, Dane & Colfax, PLLC



HUD *FAIR HOUSING PLANNING GUIDE*

- © “The HUD Guide is firmly rooted in the statutory and regulatory framework and consistent with the case law, and it is persuasive on the issue addressed in this Opinion.” 495 F.Supp.2d at 387.

Courtesy of Michael Allen, Relman, Dane & Colfax, PLLC

COURT RELIES UPON *GUIDE* PROVISIONS TO DEFINE AFFH OBLIGATIONS

- © “HUD interprets the objective affirmatively to further fair housing to mean, among other things, to ‘[p]rovide opportunities for inclusive patterns of housing occupancy regardless of race, color, religion, sex, familial status, disability and national origin.’ HUD Guide at 1-3.” *Id.* at 387.

Courtesy of Michael Allen, Relman, Dane & Colfax, PLLC

COURT RELIES UPON *GUIDE* PROVISIONS TO DEFINE AFFH OBLIGATIONS

- © “An analysis of impediments under this duty involves an ‘assessment of conditions, both public and private, affecting fair housing choice for all protected classes.’ [HUD Guide] at 2-7.” *Id.* at 387.

Courtesy of Michael Allen, Relman, Dane & Colfax, PLLC

SUMMARY JUDGMENT DECISION

- ◎ “[T]he central goal of the obligation to AFFH [is] to end housing discrimination and segregation.” *U.S. ex rel. Anti-Discrimination Center v. Westchester County*, 668 F.Supp.2d 548, 564 (S.D.N.Y. 2009)
- ◎ “[A] determination that affordable housing is the greatest impediment does not absolve the County from its requirement to analyze race-based impediments to fair housing.” *Id.* at 562.

SUMMARY JUDGMENT DECISION

- ◎ The ruling - rejecting the County's motion for summary judgment - instead granted partial summary judgment to the Anti-Discrimination Center.
- ◎ “The County has simply not shown that it analyzed whether there were race-based impediments to housing choice independent of the problem of low income, and as such, it did not comply with the requirement to AFFH.” *Id.* at 565.

SUMMARY JUDGMENT DECISION

- ◎ Westchester also claimed that a failure to keep a promise to AFFH did not count as a false claim violation. The Court held differently: “[E]ach time the County submitted a request for payment of those funds it made an impliedly false certification.”
- ◎ **All of the express annual AFFH certifications are false** as a matter of law, **and so are more than 1000 implied AFFH certifications** (claims for payment based on the express certifications). *Id.* at 566-67.

SUMMARY JUDGMENT DECISION

- ◎ The Court also rejected the County's argument **that income could be used as a proxy for race.**
- ◎ "As a matter of logic, **providing more affordable housing for a low income racial minority will improve its housing stock but may do little to change any pattern of discrimination or segregation.** Addressing that pattern would at a minimum necessitate an analysis of where the additional housing is placed. *Id.* at 564-5.
- ◎ "Without a targeted analysis of race as a potential impediment to fair housing, the County was unprepared to grapple with the second component of its AFFH duty to take appropriate action to overcome the effects of any racial discrimination or segregation it might identify as an impediment."

SUMMARY JUDGMENT DECISION

- © “[T]he grant funds at issue in this case were expressly conditioned on the AFFH certification requirement. The AFFH certification was not a mere boilerplate formality, but rather was a substantive requirement, rooted in the history and purpose of the fair housing laws and regulations, requiring the County to conduct an AI, take appropriate actions in response, and to document its analysis and actions.” *Id.* at 569.

SETTLEMENT TERMS

- ⊙ County required to ensure development of 750 affordable housing units, within 7 years, in the whitest neighborhoods.
- ⊙ 660 units must be built in municipalities with African-American population of less than 3% and Latino population of less than 7%.
- ⊙ Additional integrative criteria at the census block group level.

Courtesy of Michael Allen, Relman, Dane & Colfax, PLLC

SETTLEMENT TERMS

- ③ HUD Appoints Monitor to Oversee Compliance with Settlement.
- ③ County Obligated to Conduct an Analysis of Impediments that Complies with FHA, Regulations and *Planning Guide*.
- ③ County Acknowledges its Authority to Sue Municipalities that Resist Affordable Units.

Courtesy of Michael Allen, Relman, Dane & Colfax, PLLC

SETTLEMENT TERMS

- ◎ County Returns \$30 Million to HUD
 - ◎ \$21.6 Million to Fund Integrative Units.
 - ◎ \$7.5 Million to Pay “Relator’s Share” for Ferreting Out False Claims.
- ◎ County Must Supply an Additional \$30 Million for Integrative Units, and Must Produce an Implementation Plan Satisfactory to Monitor.
- ◎ County Pays \$2.5 Million in Attorneys’ Fees and Costs.

POST-SETTLEMENT

- ③ Court-appointed Monitor has twice rejected County's Implementation Plan for building integrative, affordable housing units.
- ③ HUD has twice rejected County's AIs and directed it to go back to the drawing board.
- ③ County risks having its federal funds terminated, and risks contempt and penalties under Settlement Agreement.

Courtesy of Michael Allen, Relman, Dane & Colfax, PLLC

IMPACT

- ② Deputy Secretary Ron Sims: “This is consistent with the [P]resident’s desire to see a fully integrated society.... Until now, we tended to lay dormant. This is historic, **because we are going to hold people’s feet to the fire.**”
- ② The ground-breaking litigation is the first to employ the federal False Claims Act ("FCA") to enforce a County's obligation to "affirmatively further fair housing." The landmark settlement combines FCA remedies with those traditionally used in housing desegregation litigation.

KEY POINTS TO AFFIRMATIVELY FURTHERING FAIR HOUSING

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KEY POINTS

- ◎ The scope of the AI is broad. It covers the full array of public and private policies, practices, and procedures affecting housing choice.
- ◎ It is recommended that the same type of problem-analysis and problem solving approach required for the Consolidated plan also be applied to Fair Housing Planning.

KEY POINTS

- ◎ Utilize focus groups, an advisory commission, town meetings, or other effective means, to maintain regular contact and working arrangements with ***all*** segments of the community. Create ongoing partnerships.
 - Fair Housing Organizations.
 - Lending and Financial Institutions.
 - Advocacy Groups.
 - Educational Institutions.
 - Housing Providers.

KEY POINTS

- ③ Communicate with the general public as to the existence and components of the FHP.
- ③ HUD encourages State and Entitlement jurisdictions to follow the citizen participation and consultation regulation requirements of the Consolidated Plan.
- ③ CDBG and HOME administrative and planning funds may be used for FHP.

KEY POINTS

- ⊙ There is no requirement regarding the timing of updates to the AI **however**:
 - ⊙ HUD suggests that jurisdictions conduct or update their AI at least once every 3 to 5 years (consistent with the Consolidated Plan cycle).
 - ⊙ Or when significant population or development changes occur within the jurisdiction **and** may have an impact on housing choice.

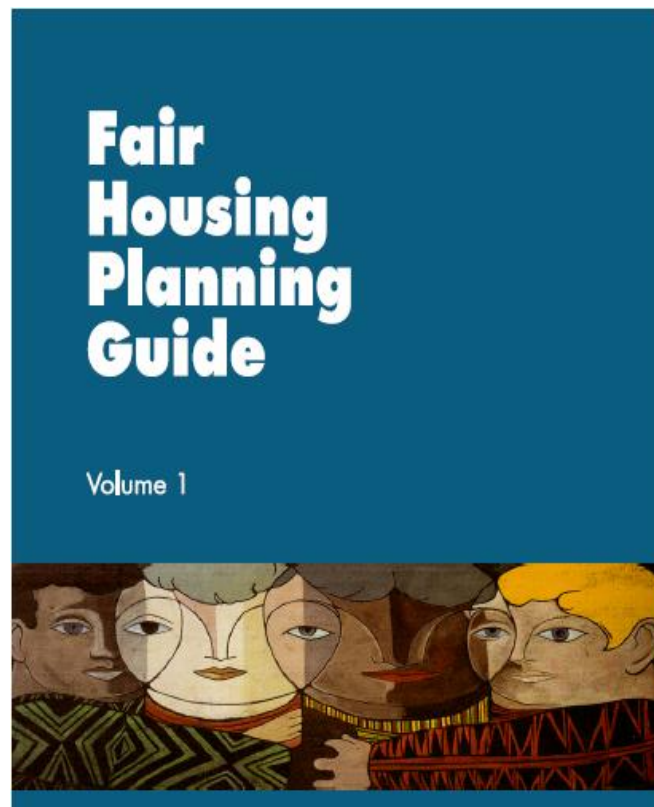
KEY POINTS

- ◎ Permitting concentration of affordable housing developments in minority neighborhoods may perpetuate segregation and is a violation of the recipient's AFFH obligation.
- ◎ Recipients are responsible for the AFFH compliance of their sub-recipients.
- ◎ You can't fund jurisdictions whose policies and practices are non-compliant with AFFH.

RESOURCES

Fair Housing Planning Guide—Volume 1

<http://www.hud.gov/offices/fheo/images/fhpg.pdf>



QUESTIONS?



APPENDIX I

AFFH AUTHORITIES

- ◎ The Fair Housing Act - adopted in 1968
- ◎ Section 808(e)(5) (42 U.S.C. 3608(e)(5) – Administration)
- ◎ *The Secretary shall administer the programs and activities relating to housing and urban development in a manner affirmatively to further the policies of this subchapter.*
- ◎ § 104(b)(2) of the Housing and Community Development Act of 1974 – covering CDBG and other Title I programs
- ◎ 42 USC 5304
- ◎ § 5A(d)(15) of the U.S. Housing Act of 1937 – as amended by § 511 of the Quality Housing and Work Responsibility Act of 1996 – covering public housing and voucher programs
- ◎ 42 USC 1437c-11
- ◎ § 426(a)(2)(G) of the McKinney-Vento Homeless Assistance Act – covering the Supportive Housing Program
- ◎ 42 USC 11386



APPENDIX II

AFFH—HOUSING AND HOMELESS PROGRAMS

- ◎ HOME – affirmative marketing and minority outreach – 24 CFR § 92.351
- ◎ HOPWA – affirmative outreach – 24 CFR § 574.603(b)

APPENDIX III

AFFH—CDBG PROGRAMS

- ◎ Housing and Community Development Act of 1974 – § 104(b) “the grantee will affirmatively further fair housing”
- ◎ Regulations at 24 CFR part 91§ 91.225(a)(1) (entitlement communities)
- ◎ § 91.325(a)(1) (States)
- ◎ § 91.425(a)(1) (consortia)

APPENDIX VI

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA ex rel.
ANTIDISCRIMINATION

CENTER OF METRO NEW

YORK, INC.,

Plaintiff,

-v-

WESTCHESTER COUNTY, NEW YORK,

Defendant.

06 Civ. 2860 (DLC)

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